BEFORE
THE PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA
DOCKET NO. 2018-320-E

IN RE: Joint Application of Duke Energy Carolinas, LLC and Duke Energy Progress, LLC to Establish Green Source Advantage Programs and Riders GSA	)	**COMMENTS OF THE SOUTH CAROLINA SOLAR BUSINESS ALLIANCE, INC.**

INTRODUCTION

On October 10, 2018 Duke Energy Progress, LLC and Duke Energy Carolinas, LLC ("Duke" or "Companies") filed a *Joint Application to Establish Green Source Advantage Programs and Riders GSA* ("GSA Program Application"). The Commission allowed interested parties to intervene and file comments in this proceeding, and on January 7, 2019 the South Carolina Office of Regulatory Staff ("ORS"), the South Carolina Coastal Conservation League and the Southern Alliance for Clean Energy ("CCL/SACE"), Walmart, and the South Carolina Solar Business Alliance ("SCSBA") filed Initial Comments regarding Duke's GSA Program Application. On January 28, 2019, Duke filed Reply Comments. The Commission allowed intervenors to file an additional round of comments pending the resolution of the North Carolina Green Source Advantage ("NC GSA") proceeding before the North Carolina Utilities Commission ("NCUC"), and on March 7, 2019, CCL/SACE and the SCCBA filed Final Comments. Duke filed Supplemental Reply Comments on March 28, 2019. In those Supplemental Reply Comments, Duke requested for the first time that Duke itself be permitted to serve as a GSA Renewable Supplier utilizing self-owned renewable resources.[1] Duke had not previously made this request during the proceeding, and Duke stated that it did not object to parties filing comments on Duke's new proposal. On April 17, 2019, the Commission granted a 30-day Extension of Time to File Responsive Comments and established a May 17, 2019 filing deadline.

For the reasons described herein, the SCSBA requests that the Commission deny Duke's request to participate in the proposed GSA Program as a GSA Renewable Supplier. Duke's belated request, made more than five months after Duke's initial GSA Program Application, was unduly delayed, and as a result, parties to this proceeding were not able consider and comment on the inclusion of Duke-owned GSA facilities during their evaluation of the proposed GSA Program as a whole. Duke's participation as a GSA Renewable Supplier is also fraught with serious legal, administrative, and equitable concerns. Duke's requested participation in the GSA Program does not appear to comply with South Carolina law, and Duke's reliance on the NCUC's GSA Order and North Carolina law is misplaced. Additionally, Duke's participation as

[1] Duke Supplemental Reply Comments at 11.

a GSA Renewable Supplier raises significant and unanswered questions regarding applicable cost recovery mechanisms, interconnection administration, the need to update GSA Program documents, and competitive advantages that Duke would hold over third-party suppliers.

For these reasons, Duke's request to participate as a GSA Renewable Supplier should be rejected. If the Commission should determine that it is appropriate to allow Duke to participate in the GSA Program as a GSA Renewable Supplier, the SCSBA requests that Duke be permitted to receive market-based cost recovery, rather than cost-of-service-based recovery, after the term of the GSA Service Agreement expires.

COMMENTS

1. Duke's delay in requesting permission to participate is prejudicial.

Duke initially filed its GSA Program Application on October 10, 2018. Duke's GSA Program Application described a three-party renewable energy procurement program that would include a (1) GSA Customer, (2) a GSA Renewable Supplier, and (3) Duke. In the multiple rounds of comments that have been filed in this proceeding, parties to this proceeding have filed lengthy and detailed comments on various aspects of Duke's proposed GSA Program. In its March 28 Supplemental Reply Comments, more than five months after filing its GSA Program Application, Duke abruptly requested permission to participate in the GSA Program as a GSA Renewable Supplier.[2] Duke stated:

> In the NC GSA Programs, as approved by the *NC GSA Program Order*, the participating GSA customer may select a renewable facility (to serve as the GSA Facility) that is owned by the Companies or owned by a third party. While the Companies did not raise this issue specifically in their Application, for the avoidance of doubt, the Companies' clarify that under the Programs, eligible GSA customers requesting to participate in the SC GSA Programs would similarly have the option to enter into a GSA Service Agreement for a GSA Facility that is owned (or will be owned) by an independent third-party developer or by DEC or DEP under their respective GSA Programs. If a participating GSA customer elects a renewable energy facility that will be developed and/or owned by Duke to serve as the GSA Facility, then the applicable Company would serve as the Renewable Supplier for purposes of the GSA Service Agreement.[3]

Although Duke claimed that it made its request "for the avoidance of doubt," Duke had not indicated until that filing that it intended to participate in the GSA Program as a GSA Renewable

[2] Duke Supplemental Reply Comments at 11.
[3] *Id.*

Supplier and provided no information about the details of how its participation in the program would work. In fact, ORS previously asked Duke to identify "any Duke Energy affiliated entity(ies)" that planned to participate in the GSA Program as a GSA Renewable Supplier, and Duke responded that "DEC and DEP are not aware of any affiliated entities" that planned to participate as a GSA Renewable Supplier.[4] Although Duke's response referred only to Duke affiliates, not Duke itself, if it had intended to participate as a GSA Renewable Supplier, the ORS information request gave Duke the opportunity to describe its plans at that time. However, Duke omitted any discussion of its own planned participation, and any "doubt" that Duke now purports to avoid was created by Duke.

Significantly, Duke's March 28, 2019 request to participate as a GSA Renewable Supplier was Duke's first filing in this proceeding after the NCUC issued its final order in the NC GSA proceeding on February 1, 2019 ("NC GSA Order") in which the NCUC indicated that Duke could participate as a GSA Renewable Supplier in North Carolina.[5] As the Commission is aware, there have been multiple references in this proceeding to the NC GSA proceeding, and Duke's proposed GSA Program in South Carolina is similar in certain respects to the NC GSA Program. Notably, Duke has previously emphasized in this proceeding that its proposed South Carolina GSA Program is "independent of the NC GSA Programs" and that "the NCUC proceeding has no bearing on the instant proceeding, and the parties to that proceeding and issues raised in that proceeding are unique to the NC GSA Program and the jurisdiction of the NCUC."[6] Despite this assertion, Duke now cites the NC GSA Order to support its request to participate as a GSA Renewable Supplier. However, Duke's reliance on the NC GSA Order is misplaced.

[4] DEC and DEP Response No. 1-9 to ORS First Audit Information Request (Dec. 21, 2018).
[5] As discussed below, the NCUC is currently considering a Motion for Reconsideration on this issue and has requested comments from Duke and other parties in response to the Motion.
[6] Duke Reply Comments at 3 (Jan. 28, 2019).

In the February 1, 2019 NC GSA Order, in a two-paragraph finding out of a sixty-five-page order, the NCUC addressed Duke-owned GSA Facilities.[7] The NCUC denied Duke's request to receive market-based cost recovery for Duke-owned GSA facilities after the expiration of the term of the GSA Service Agreement.[8] In doing so, the NCUC indicated that Duke could participate in the NC GSA Program as a GSA Renewable Supplier, but the NCUC also noted that "[t]he other parties have not specifically addressed this issue."[9] That was because, as it did here, Duke went out of its way to downplay the issue of its participation as a GSA Renewable Supplier, and it went unnoticed and undiscussed by parties to the North Carolina proceeding.[10]

This is now the second GSA proceeding in which Duke has either minimized discussion of its intent to participate as a GSA Renewable Supplier, as it did in North Carolina, or has simply failed to disclose its intent to participate as a GSA Renewable Supplier during the course of the proceedings at all, as it has done here. As noted, in neither case did Duke provide any detailed discussion of the complex mechanics of its participation as a GSA Renewable Supplier and provide other parties the opportunity to comment on its proposal. Duke's questionable approach to this request has prevented parties from addressing the issue in prior comments that considered the proposed GSA Program as a whole and has resulted in Duke entirely failing to provide a sufficient explanation for how its participation would impact the GSA Program, including impacts on GSA Customers, other GSA Renewable Suppliers, and ratepayers. For this reason, and for the reasons described below, Duke's request should be denied.

[7] NC GSA Order at 63.
[8] *Id.*
[9] *Id.*
[10] Duke mentioned its participation as a GSA Renewable Supplier only twice in the body its NC GSA Program Application – once in a footnote and again in brief reference to post-term cost recovery. *See* Duke NC GSA Application at 7, n. 4 and at 63.

2. Duke should not be allowed to participate in the GSA Program as a GSA Renewable Supplier.

a. H.B. 3659 does not permit Duke to participate as a GSA Renewable Supplier.

South Carolina House Bill 3659, passed by the General Assembly on May 9, 2019, requires electrical utilities to file a "voluntary renewable energy program" within 120 days of the effective date of the statute.[11] The statute states that "[i]f the commission determines that an electrical utility has a voluntary renewable energy program on file with the commission as of the effective date of this chapter, that conforms with the requirements of this section, the utility is not required to make a new filing to meet the requirements of subsection (A)." Therefore, if Duke intends for the proposed GSA Program in this proceeding to qualify as a voluntary renewable energy program under Section 58-41-30, Duke's GSA Program must comply with the requirements of the statute.[12]

However, the statute does not permit Duke to participate as a GSA Renewable Supplier. First, the statute defines "Renewable energy suppliers" as "the owner or operator of a renewable energy facility, including the affiliate of an electrical utility that contracts with a participating customer."[13] The statute specifically allows Duke affiliates to participate, but it does not state that Duke, itself, can be a renewable energy supplier. If the General Assembly had intended for Duke to be a renewable energy supplier, it could have expressly stated so as it did for Duke affiliates. Moreover, the statute defines "Renewable energy contract" as "a power purchase agreement between an electrical utility and a renewable energy supplier that commits the parties to participating in an electrical utility's voluntary renewable energy program for the purchase and sale of energy and capacity"[14] and defines "Participating customer agreement" as "an agreement between a participating customer, its electrical utility, and the renewable energy supplier establishing each party's rights and obligations under the electrical utility's voluntary renewable energy program."[15] The statute clearly describes agreements *between* Duke and the renewable energy supplier—it does not describe agreements in which Duke itself is the supplier. Because the statute does not contemplate Duke's participation as a renewable energy supplier,

[11] Section 58-41-30(A).
[12] In addition, given that Duke's program was not approved prior to the passage of H.B. 3659, the Commission should not now approve a GSA Programs that does not comply with the statute.
[13] Section 58-41-10(13).
[14] Section 58-41-10(11)(emphasis added).
[15] Section 58-41-10(8)(emphasis added).

the Commission should not allow Duke to serve as a GSA Renewable Supplier in this proceeding.

b. Duke's participation as a GSA Renewable Supplier has not been sufficiently explained or supported, and it creates significant administrative and legal uncertainty.

In its Supplemental Reply Comments, Duke states that:

> [E]ligible GSA customers requesting to participate in the SC GSA Programs would similarly have the option to enter into a GSA Service Agreement for a GSA Facility that is owned (or will be owned) by an independent third-party developer or by DEC or DEP under their respective GSA Programs. If a participating GSA customer elects a renewable energy facility that will be developed and/or owned by Duke to serve as the GSA Facility, then the applicable Company would serve as the Renewable Supplier for purposes of the GSA Service Agreement.[16]

Although Duke presents this transaction as relatively straightforward, Duke has not described or explained several critical elements of its proposal.

i. Program Administration

First, Duke has not explained how the applicable GSA documents would differ if Duke was a GSA Renewable Supplier. For example, the draft GSA Service Agreement that Duke attached to its Supplemental Reply Comments is a three-party agreement amongst Duke, the GSA Customer, and the GSA Renewable Supplier, and the Service Agreement contains references to transactions including the three parties to the agreement.[17] Duke has not provided a sufficient explanation of how the GSA Service Agreement would need to be altered in the event that Duke was a GSA Supplier, and any alternative GSA Service Agreement should be provided to the Commission and intervenors for review and comment.

[16] Duke Supplemental Reply Comments at 11.
[17] *Id.*, Exhibit E.

Next, Duke has not addressed the ways in which it would be unfairly advantaged by not having to enter into a PPA with itself as the GSA Renewable Supplier. Duke notes in its Supplemental Reply Comments that if Duke was the GSA Renewable Supplier, "[a] PPA would not be required in these circumstances because DEC or DEP would own the GSA Facility."[18] Duke's participation as a GSA Renewable Supplier, without a PPA, would put Duke at a significant competitive advantage relative to third-party GSA Renewable Suppliers. Without a PPA, Duke would not face termination by itself for events of default and would not be subject to damages to itself for failure to perform or be required to post substantial performance security which impose significant costs and risks on third-party developers. A third-party GSA Renewable Supplier must factor these PPA requirements into the purchase price of the PPA it negotiates with a prospective GSA Customer, placing the third-party supplier at a competitive disadvantage relative to Duke.

Duke has also not addressed other competitive advantages that it would hold over third-party GSA Renewable Suppliers with respect to existing information about and business relationships with potential GSA Customers. In particular, Duke could unfairly leverage its existing relationships with its customers to assist it in securing their business as a GSA Customer. While it is possible that the Commission could establish safeguards against such practices, these issues have not been addressed in this proceeding, and such assurances do not currently exist.

ii. *Cost Recovery*

Duke has not adequately explained its cost recovery as a GSA Renewable Supplier, and this issue raises significant administrative and legal concerns. Duke states that:

> To ensure non-participating customers are not impacted by a participating GSA customer's decision to select a Company-developed (or Company-owned) renewable facility under the GSA Programs, the costs the Company would seek to recover in such instance would be limited to the amount of the GSA Bill Credit paid to the participating GSA customer. That is, the costs of any renewable facility developed under the GSA Program that the applicable Company would seek to recover from non-participating customers would be limited to only the GSA Bill Credit, regardless of whether the renewable facility is owned by one of the Companies or owned by a third-party developer.[19]

[18] *Id*. at 11, n. 21.
[19] *Id*. at 11.

First, with respect to the GSA Bill Credit, Duke notes that "[t]he Companies would seek to recover the cost of the GSA Bill Credit paid to a participating GSA customer originating from a Company-owned GSA Facility in a base rate case and not through the annual fuel proceeding."[20] Duke has not specified, however, whether Duke intends to earn a rate of return on the GSA Bill Credit recovered through the base rate case—as it normally would for a Duke-owned asset—or whether it would only recover the GSA Bill Credit amount, as if it was a fuel expense or other operating cost. Duke is not required to take on any risk with respect to funds expended in paying the bill credit and should not be entitled to earn a profit on such expenditures. In any event, Duke has not adequately addressed this issue, and it is unclear whether Duke's recovery of the GSA Bill Credit as proposed is consistent with South Carolina law.

It is also unclear how Duke would recover its investment in the GSA Facilities and whether such recovery is legally permissible. This includes Duke's general recovery of the cost of the GSA Facility, whether Duke would plan to recover its entire investment during the GSA Service Agreement, and if not, how Duke would recover any additional revenues after the term of the GSA Service Agreement.

Under Duke's proposal, if Duke was a GSA Renewable Supplier and negotiated a service agreement with a GSA Customer, the GSA Customer would pay the negotiated GSA Product Charge to Duke. Instead of Duke assigning the Product Charge to a third-party Renewable Supplier – as Duke proposes to do in a three-party GSA Program structure – Duke would keep the GSA Product Charge which presumably would be used by Duke to pay down the cost of developing or purchasing the GSA Facility. This structure, in which Duke competes with other third-party GSA Renewable Suppliers for the business of the GSA Customer, and receives that market rate from the GSA Customer for the duration of the GSA Service Agreement, amounts to market-based cost recovery for Duke. While such market-based recovery for a Duke-owned system generation asset is conceptually appropriate where the utility is allowed to act as a market-participant in the GSA Program, it is a major departure from the cost of service-based recovery, plus a rate of return, that Duke receives for all other Duke-owned assets under South Carolina law and regulatory practice, and it is not clear that Duke may legally enter into this type of market-based arrangement.

[20] *Id.*, n. 22.

In contrast to the North Carolina renewable energy legislation—House Bill 589—which specifically permitted market-based recovery for competitive renewable energy procurement programs,[21] South Carolina law does not permit the type of market-based recovery that Duke would apply as a GSA Renewable Supplier during the term of the GSA Service Agreement. Absent an authorization of market-based recovery, Duke would have to recover its facility investment according to traditional cost-of-service ratemaking for electric system assets serving retail customers. In other words, Duke would rate base the cost of the Duke-owned GSA Facility, including receiving a rate of return on that investment. However, this type of cost recovery is completely antithetical to the idea of Duke acting as a market participant and competing with independent suppliers for the business of GSA customers. Allowing Duke to rate base the GSA Facility would require a completely different GSA Program structure specific to Duke-owned GSA Facilities, since Duke would be recovering its facility investment from non-participants as a system supply asset, thereby removing the need for a participating customer bill credit and a participating customer-negotiated GSA Product Charge, as laid out in Duke's proposal. In essence, this approach would likely amount to a simple renewable energy credit ("REC") purchase program, a fundamentally different type of offering than what Duke has proposed in its Application. It also would allow Duke to compete unfairly with independent suppliers because the price it offered to GSA Participating Customers would have no bearing on Duke's cost recovery.

In addition to the question of Duke's cost recovery during the GSA Service Agreement, Duke has also not provided any description of whether and how it would recover any additional revenues of the GSA Facility after the expiration of the GSA Agreement. The maximum GSA Service Agreement under Duke's proposal is 20 years, and customers may choose to enter into GSA Service Agreements for as few as two years. It is unlikely that Duke would attempt to recover the full cost of a solar GSA Facility, which has a 30-35 year useful life, over a contract with a maximum length of 20 years.[22] Therefore, after the expiration of the GSA Service Agreement, Duke, like independent suppliers, would likely have a need to recover significant

[21] *See*, N.C. Gen. Stat. § 62-110.8(g); North Carolina Commission Rule R8-71(j).
[22] Although Duke certainly *could* attempt to do so, this would likely require Duke to charge the GSA Customer a much higher rate to account for the shorter recovery period (similar to the higher rate that a homeowner would pay on a 15-year home mortgage rather than a 30-year mortgage).

additional revenues in order for the project to be financially viable. However, this post-term cost recovery raises further legal and fairness issues.

If Duke was permitted to rate base the net book value of the asset, it would have guaranteed cost recovery of the remaining value of the asset. This guaranteed cost recovery would put Duke at a steep competitive advantage over third-party GSA Renewable Suppliers. This is because, in determining the price it can offer to its counterparty, the third-party developer must calculate its likely revenue recovery after the initial contract term. Because the developer's ability to contract subsequently, and the rate that it will be able to obtain (if any), are highly uncertain, the developer must discount its assumption about that future revenue. The greater the uncertainty and discount rate, the higher the developer must price its initial contract—in this case, the GSA Service Agreement—in order to be able to secure project financing. Conversely, if Duke is guaranteed recovery of the net book value of its GSA Facilities after the term of the GSA Service Agreement, it faces zero risk with respect to future revenues and therefore is not required to increase its front-end price to cover that risk. This would allow Duke to use its status as a regulated monopoly to assert a significant and unfair competitive advantage over third-party GSA Renewable Suppliers. The Commission should not support this outcome of allowing Duke to dominate the GSA Program.

A much more reasonable alternative – if the Commission should decide over SCSBA's objection to allow Duke to participate as a GSA Renewable Supplier – would be for Duke to earn additional market-based cost recovery after the GSA Service Agreement expires, putting Duke on more equal footing with other GSA Renewable Suppliers. This, in fact, is what Duke originally requested in the NC GSA Proceeding, and what is currently being considered in a pending Motion for Reconsideration in North Carolina. However, as discussed above, while North Carolina law expressly permits Duke to earn market-based cost recovery in lieu of cost of service-based recovery in certain limited circumstances, there is currently no analogous provision in South Carolina law. As a result, similar to market-based recovery during the GSA Service Agreement, it is not clear that market-based post-term recovery is permitted under South Carolina law, and the alternative, allowing Duke to rate base the net book value, would lead to a severely inequitable result.

iii. Interconnection

With respect to interconnection of solar facilities, Duke has not addressed how it will manage potential conflicts of interest or whether objectionable competitive advantages will arise if the Company is allowed to participate as a GSA Renewable Supplier. Duke has clear obligations under federal and state law to treat all projects in its interconnection queues in a non-discriminatory matter. The federal Public Utility Regulatory Policies Act, 16 U.S.C. § 2601 et seq. ("PURPA") and implementing regulations require utilities to provide interconnection to Qualifying Facilities on a non-discriminatory basis. 16 U.S.C. § 824a-3(b), 18 C.F.R. § 292.306(a). This Commission also has an obligation under South Carolina law to remedy any "unreasonable discrimination" in the provision of services by a utility. S.C. Code Ann. § 57-27-850. These legal obligations are especially important here where, if Duke is allowed to participate as a GSA Renewable Supplier, the Company has the incentive to prefer Duke owned projects over non-Duke projects. In the event that Duke is permitted to act as a GSA Renewable Supplier, the Commission should be vigilant to ensure that discrimination does not take place.

As this Commission is aware, interconnection challenges continue to afflict the Company's processing of its interconnection queue. There are currently dozens of unresolved interconnection disputes that have been filed by solar developers under the South Carolina Generator Interconnection Procedures, Forms and Agreements (SCGIP) relating to significant concerns over study delays, the application of various technical screens, and accounting practices adopted by Duke. If allowed to participate as a GSA Renewable Supplier, these interconnection difficulties could continue to vex third-party developers while simultaneously providing an incentive for Duke to discriminate against and exploit unfair advantages over third-party solar developers.

For example, here are two plausible scenarios that could result from Duke's participation as a GSA Renewable Supplier:

1. According to Duke Energy's *Generator Interconnection Report* filed with this Commission pursuant to Order No. 2018-803(A), the Company's interconnection queue is severely backlogged due to a litany of issues allegedly outside of the Company's control. Based on this report, as well as the experience of SCSBA members, there is no viable option for the interconnection of new projects entering the queue in a timely manner consistent with the current SCGIP. Therefore, Duke's

ability to act as a GSA Renewable Supplier would likely require the purchase of favorably queued projects owned by third-party developers. In negotiating for the purchase of these projects, Duke would have access to proprietary information about its grid related to interconnection costs and timing, resulting in an unfair negotiating advantage over third-party developers that are not privy to that same information.

2. Alternatively, the Company could be incentivized to pursue an approach to reforming the interconnection process and SCGIP in way that further disadvantages legacy projects, which continue to suffer from interconnection delays despite extensive investments in the current serial queue process, in favor of more recent projects originated by the Company based on proprietary knowledge of the grid and an ability to sidestep the serial queue study process altogether.

Although there may be options for sufficiently mitigating these types of concerns, the cursory details included in Duke's comments related to its participation in the GSA Program do not allow for meaningful analysis by the SCSBA or this Commission, and the incentive for Duke to engage in uncompetitive and discriminatory behavior in order to successfully compete as a GSA Renewable Supplier is substantial.

CONCLUSION

As described herein, Duke's participation in the GSA Program as a GSA Renewable Supplier would likely not comply with South Carolina law and would create significant administrative and equitable concerns. These issues would result in substantial implementation challenges and uncertainty, in addition to the uncertainty already created by Duke's five-month delay in requesting permission to participate in the GSA Program as a Renewable Supplier. For these reasons, the SCSBA respectfully requests that the Commission deny Duke's request to participate as a GSA Renewable Supplier. If the Commission determines over the objection of the SCSBA that it is appropriate to allow Duke to participate in the market-based GSA Program as a GSA Renewable Supplier, the SCSBA requests that Duke also be permitted to receive market-based cost recovery, rather than cost-of-service-based recovery, after the term of the GSA Service Agreement expires.

[Signature Page Follows]

Respectfully Submitted,
/s/Richard L. Whitt
AUSTIN & ROGERS, P.A.
508 Hampton Street, Suite 203
Columbia South Carolina, 29201
(803) 251-7442

May 17, 2019
Columbia, South Carolina

Counsel for the South Carolina Solar Business Alliance, Inc.